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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 907.

ORLANDO J. HOLLISTER, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED JULY 23, 1883.

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1 *Complaint.*

In the dist. court of the 3d judicial district of Utah Territory.

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, pl'ff,
vs.
ORLANDO J. HOLLISTER, DEF'T.

The said plaintiff complains of said defendant, and alleges for a first cause of action that said plaintiff is & at all times hereinafter mentioned was a corporation under the laws of Utah Territory, solely for the purpose of carrying on the mercantile business; that the said defendant was at all times hereinafter mentioned, & still is, the acting United States collector of internal revenue for Utah Territory. That in the year, A. D. 1876, the said plaintiff made certain mercantile orders, specimen copies of which are attached hereto, marked respectively Exhibit A, B, C, & made part of this complaint. That said plaintiff made & used said orders for
2 the purpose of paying its employees, when they were willing to take their pay in merchandize, & also as a means of convenience in exchange for produce, which it was agreed should be paid for in merchandize, but did not make, use, pay out, or circulate such orders, or any of them, for any other purpose or in any other manner whatever. That, to wit, on the 25th day of July, 1878, the United States Commissioner of Internal Revenue set down to and assessed against said plaintiff a special tax of ten per cent., amounting to nine hundred & fifty dollars, as upon notes alleged to have been used by plaintiff for circulation & paid out by it for the two months ending November 30, 1876. That the list containing said assessment was by said Commissioner of Internal Revenue placed in the hands of said defendant as such collector as aforesaid. That thereafter, to wit, on the 30th day of July, 1878, the said defendant as such
3 collector, proceeded to, and did demand the payment of said tax assessed as aforesaid by said plaintiff to said defendant; and then and there threatened that unless said payment of said tax was made as aforesaid, said defendant, as such collector, would seize upon and sell sufficient of plaintiff's property to pay said tax so assessed.

That thereupon at the time last above mentioned, and while defendant so threatened and was about to seize upon and so sell plaintiff's property as aforesaid, said plaintiff, under protest & with notice to said defendant that said tax was erroneous and illegal, and that suit would be commenced against said defendant to recover the same, and to prevent the seizure and sale of plaintiff's property as aforesaid, paid to said defendant the amount of said tax, to wit, the said sum of $950.00; that afterwards, to wit, on the 25th day of September, A. D. 1879, the said plaintiff duly made its appeal to the Commissioner of Internal Revenue according to the provisions of the law in that regard, and the regulations of the Secretary of
4 the Treasury established in pursuance thereof, to have the said amount assessed and paid as aforesaid refunded; that said Commissioner, to wit, on the 14th day of October, A. D. 1879, decided said appeal against the plaintiff herein, and refused to refund the said

sum or any part thereof, excepting the sum of five hundred dollars; that the said assessment, demand for payment, and payment were made upon the merchandize orders hereinbefore described and upon no others, and for the use of them as hereinbefore stated, and for no other use or circulation by said plaintiff of the said or any notes whatever; that there remains due and owing to plaintiff from said defendant on the payment aforesaid the sum of $450.00.

Wherefore plaintiff prays judgement against said defendant for the sum of $450.00, with interest thereon from the 30th day of July, 1878, and costs of suit.

2. For a further and second cause of action said plaintiff alleges
5 that plaintiff is and at all times hereinafter mentioned was a corporation under the laws of Utah Territory, solely for the purpose of carrying on the mercantile business; that said defendant was at all times hereinafter mentioned, and still is, the acting United States collector of internal revenue for the district of Utah Territory.

That in the year A. D. 1876, the said plaintiff made certain merchandise orders, specimen copies of which are hereto attached, marked respectively Exhibit A, B, C, and made a part of this complaint. That said plaintiff made and used said orders for the purpose of paying its employees when they were willing to take their pay in merchandize, and also as a means of convenience in exchange for produce, which it was agreed should be paid for in merchandize, but did not make, use, pay out, or circulate such orders, or any of them, for any other purpose or in any other manner whatever. That, to wit, on the 25th day of July, 1878, the United States Commissioner of Internal Revenue set down to and assessed against said
6 plaintiff a special tax of ten per cent., amounting to nine thousand and fifty dollars, as upon notes alleged to have been used by plaintiff for circulation, and paid out by it between the 30th day of November, 1876, and the 1st day of June, 1878; that the list containing said assessment was by said Commissioner of Internal Revenue placed in the hands of said defendant as such collector as aforesaid; that thereafter, to wit, on the 7th day of August, 1878, the said defendant, as such collector, proceeded to, and did, demand the payment of said tax assessed as aforesaid by said plaintiff, and then and there threatened that unless said payment of said tax was made as aforesaid said defendant, as such collector, would seize upon and sell sufficient of plaintiff's property to pay said tax so assessed. That thereupon, at the time last above-mentioned, and while defendant so threatened, and was about to seize upon and sell plaintiff's property as aforesaid, said plaintiff, under protest, and with notice to said de-
7 fendant that said tax was erroneous and illegal, and that suit would be commenced against said defendant to recover the same, and to prevent the seizure and sale of plaintiff's property as aforesaid, paid to said defendant the amount of said tax, to wit, the said sum of $9,050.00.

That, to wit, on the 25th day of September, A. D. 1879, the said plaintiff duly made its appeal to the Commissioner of Internal Revenue according to the provisions of the law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof, to have the said amount assessed and paid as aforesaid, refunded. That said Commissioner, to wit, on the 14th day of October, A. D. 1879, decided said

appeal against the plaintiff herein, and refused to refund the said sum or any part thereof. That the said assessment, demand for payment, and payment, were made upon the merchandize orders hereinbefore described, and upon no others, and for the use of them as hereinbefore stated and for no other use or circulation by said plaintiff, of the said or any notes
8 whatever; that there remains due and owing to plaintiff from said defendant, on the payment aforesaid, the sum $9,050.00.

Wherefore plaintiff prays judgment against said defendant for the said sum of $9,050.00 with interest thereon from the 7th day of August, 1878, and costs of suit.

SHEEKS AND RAWLINS,
Attorneys for Plaintiff.

TERRITORY OF UTAH,
County of Salt Lake, ss:

Theo. G. Webber, being first duly sworn, on his oath saith, I am an officer of the above-named corporation, the plaintiff, to wit, the secretary thereof, and make this affidavit on its behalf; I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge.

THOS. G. WEBBER.

Subscribed & sworn to before me this 28th day of Nov., 1879.
[SEAL.] H. J. GRANT,
Notary Public.

EXHIBIT A.

9 652.] *Series A.* [5.

SALT LAKE CITY, *Oct.* 6, 1876.

Pay David O. Calder, or bearer, five dollars in merchandize, at retail.
Five. Five.
G. H. SNELL.

To H. B. CLAWSON,
Sup't Z. C. M. I.

EXHIBIT B.

1597.] *Series A.* [2.

SALT LAKE CITY, *Oct.* 6, 1876.

Pay David O. Calder, or bearer, two dollars in merchandize, at retail.
Two. Two.
G. H. SNELL.

To H. B. CLAWSON,
Sup'd't Z. C. M. I.

EXHIBIT C.

354.] *Series A.* [1.

SALT LAKE CITY, *Oct.* 6, 1876.

Pay David O. Calder one dollar in merchandize, at retail.

One. One.

G. H. SNELL.

To H. B. CLAWSON,
Sup't Z. C. M. I.

(Endorsed:) Title of court and cause. Complaint. Filed Nov. 28th, 1879. O. J. Averill, clerk, by Chas. F. Blandin, deputy clerk. Issued Nov. 29th, 1879.

10 *Demurrer to complaint.*

Title of court and cause.

The defendant comes and demurs to the complaint of plaintiff and to both counts and to the whole thereof in the above-entitled action, and for cause states that the said complaint in either count thereof does not state facts sufficient to constitute a cause of action.

VAN ZILE & BEATTY,
Attorneys for Defendant.

TERRITORY OF UTAH,
County of Salt Lake, ss:

James H. Beatty, being first duly sworn, says he is one of the attorneys of the defendant in the above-entitled action, and that the foregoing demurrer is not interposed for delay merely.

JAMES H. BEATTY.

Subscribed & sworn to before me this 22d day of Dec., A. D. 1879.
[SEAL.] O. J. AVERILL, *Clerk*,
By R. C. TERRY,
Dep'ty Clerk.

(Endorsed:) Title of court and cause. Demurrer to complaint.
11 Rec'v'd a copy hereof this 22d day of Dec., A. D. 1879. Sheeks & Rawlins, by Olesen. Filed Dec. 22d, 1879. O. J. Averill, clerk, by Chas. M. Blandin, dep. clerk.

Order overruling demurrer.

(Title.)

And the court now advised upon the demurrer of defendant to the complainant, it is ordered that said demurrer be, and the same is hereby, overruled, to which ruling defendant duly excepted, and defendant is allowed twenty days' time from this date to answer herein.

JOHN A. HUNTER, *Judge.*

JUNE 3D, 1880.

Answer.

(Title of court and cause.)

The defendant for answer to the first cause of action in plaintiff's complaint in the above-entitled action, and upon information and belief denies that the exhibits A, B, C, attached to the copy of complaint served
12 upon defendant, are correct copies of the orders or notes issued by plaintiff as alleged, but, on the contrary, defendant alleges that the orders referred to in said complaint as issued by plaintiffs were substantially in the form described, were printed on good paper, resembling bank notes, and such as would be taken and considered by the masses of the people as bank notes or as a circulating medium. That in addition to the words and figures given in said complaint as descriptive of said orders, the denomination of each of said orders or notes appeared upon the face thereof and across the same in three places in large letters and figures. Defendant denies that the plaintiff did not use, make, pay out, or circulate said notes or orders, except for the purpose of paying its employees, or as a means of convenience in exchange for produce. Defendant for his further answer to said first cause of action, and upon his information and belief, says that during the months of October and November, 1876, the plaintiff
13 issued its notes or orders to the amount of nine thousand five hundred dollars in substantially the form as described in said complaint and hereinbefore, and of such form, material, and appearance as to be readily taken and passed as money and a circulating medium.

That plaintiff paid out and issued said notes or orders to any and all persons who would accept them in payment of any debts owing by plaintiff for produce, labor, or other commodities, or causes, the same as money; also received them in payment of goods or other commodities sold, or for debts due plaintiff plaintiff took and received said notes and orders the same as money, and again paid out said notes and orders in the course of trade the same as other money. That after the issue of said notes or orders as aforesaid by plaintiff they were used for circulation and as a circulating medium at Salt Lake City, in said Utah Territory, as well as at other places in said Territory, by a large portion of the people
14 in all of their business transactions the same as money, and by them treated as money, and to a considerable extent said notes and orders during the years 1876 to 1878, inclusive, did displace as a circulating medium to the amount of said notes or orders the lawful currency and money authorized by the Government of the United States. And defendant denies there is the sum of $450.00 or any other sum or any interest due plaintiff from defendant.

Defendant further says that the tax or assessment levied and collected of plaintiff and complained of, was the same assessed and collected on account of the issue and circulation as above stated of said sum of $9500.00 in said notes or orders, and defendant also says in the matter of said assessment and collection of said tax, and in all he did connected therewith, he acted only by virtue of his authority as assessor and collector of the internal revenue of the Government of the United States, and
15 under the direction of the proper officers of said Governments.

Defendant for answer to the second cause of action in said complaint alleged, upon his information and belief denies that the exhibits A, B,

& C, attached to the copy of complaint, served upon defendant, are correct copies of the orders or notes issued by plaintiff, as alleged and referred to in said complaint. But defendant says that the said orders so referred to in said complaint, as issued by plaintiff, were substantially in the form described in said complaint, but were printed on good paper resembling bank notes, were prepared and issued in the form and of the material resembling bank notes, and such as would be taken and considered by the mass of the people as bank notes, or as a circulating medium; that in addition to the words and figures given in said complaint as descriptive of said orders or notes, the denomination of each of said notes or orders appeared across the face thereof in large letters and figures. Defendant denies that plaintiff did not make use, pay out, or circulate such
16 orders, or any of them, for any other purpose than paying its employees, or as a means of convenience in exchange for produce. Defendant for further answer to said second cause of action, upon his information and belief, says that during the time from November, 1876, until the month of July, 1878, the plaintiff issued, paid out, and put into circulation its notes and orders in substantially the form described in said complaint and this answer, to the amount of ninety-five thousand dollars; that said notes and orders were of such form, material, and appearance as to be readily taken and passed as and for money and a circulating medium; that plaintiff paid out and issued said notes or orders to any and all persons who would accept them in payment of any debts owing by plaintiff for produce, labor, or other commodities or causes, the same as money; also received them in payment for goods, merchandize, and other
17 wares sold by plaintiff, or for debts due plaintiff, the same as money, and in like manner plaintiff again, in the course of trade, paid out said notes and orders, and they were thus made, through the agency of plaintiff, to operate as and take the place of a circulating medium.

That after their issue by plaintiff as aforesaid, they were used for circulation and as a circulating medium at Salt Lake City and other places in said Territory of Utah by a large portion of the people in all their business transactions the same as money, and by said people as well as by plaintiff were treated as money and a circulating medium, and to the extent of their issue during the time last-above stated did displace, as a circulating medium the legal and authorized currency and money authorized by the Government of the United States; that the said sum of $9,500.00 levied against and collected of, and by plaintiff complained of in said alleged second cause of action, was the same sum assessed and collected
18 on account of the issue and circulation of said notes or orders as above stated; and defendant further says, in the matter of said tax complained of by plaintiff in this action, the defendant, in all he did therein, acted under and by virtue of his official capacity, and his authority as assessor and collector of internal revenue of said United States Government, and under the directions of the proper officers of said Government; and he now denies there is the sum alleged, or any sum whatever, or any interest due the plaintiff from defendant.

Wherefore the defendant now prays the judgment of this court that this action be dismissed, that plaintiff take nothing thereby, and defendant have his costs and all proper relief.

VAN ZILE AND BEATTY,
Attorneys for Defendant.

TERRITORY OF UTAH,
Salt Lake County, ss.:

O. J. Hollister, being first duly sworn, says he is the defendant in the above-entitled action; has read the above answer, and knows its
19 contents, which he says is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it true.

ORANDO J. HOLLISTER.

Subscribed and sworn to before me this 25th day of June, A. D. 1880.
[SEAL.] E. G. MATTHEWS,
Notary Public.

(Endorsed:) Title of court and cause. Answer. Rec'v'd copy of within this 25th day of June, A. D. 1880. Sheeks & Rawlins, plaintiff's attorneys. Filed June 25th, 1880. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Verdict.

(Title of court and cause.)

We, the jurors empanelled in the above case, find for the plaintiff as follows: For the sum of $450.00, with interest, at 10% per annum, from July 30th, 1878; and the further sum of $9,050.00, with interest, at 10% per annum, from Sept. 7th, 1878. Total amount found for plaint-
20 iff, principal & interest ($12,056.55½), twelve thousand and fifty-six and fifty-five and one-half one-hundredths dollars.

FRANCIS COPE, *Foreman.*

MAY 14, 1881.

(Endorsed:) Filed May 14th, 1881. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Judgment on verdict.

In the district court of the third judicial district of the Territory of Utah, in and for the county of Salt Lake.

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, plaintiff,
vs.
ORLANDO J. HOLLISTER, DEFENDANT.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called,
21 answered to their names, and say they find a verdict for the plaintiff, to wit: We, the jurors empaneled in the above cause, find for the plaintiff as follows: For the sum of $450.00, with interest, at 10%

per annum, from July 30th, 1878; and the further sum of $9,050.00, with interest, at 10% per annum, from September 7th, 1878. Total amount found for plaintiff, principal and interest ($12,056.55½), twelve thousand fifty-six & fifty-five and one-half one-hundredths dollars. May 14th, 1881.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendant the sum of $12,056.55½ dollars, with interest thereon at the rate of 10% per annum from the date hereof till paid, together with said costs and disbursements incurred in this action, amounting to the sum of forty and $\frac{25}{100}$ dollars ($40.25).

Judgment rendered May 14th, 1881.

(Endorsed:) Title of court and cause. Judgment on verdict. Filed May 14th, 1881. O. J. Averill, clerk, by H. G. McMillan, dep'ty clerk.

22 *Notice of motion for new trial.*

Notice of motion for new trial.

(Title of court and cause.)

To J. L. RAWLINS,
Attorney for Plaintiff:

You will take notice that the defendant in the above-entitled action will on the 10th day of October, 1881, at 10 a. m., at the court room of the said court in the Wasatch Building at Salt Lake City and county, said Territory, or as soon after said time as counsel can be heard, move the said court for new trial in said cause, and said motion will be based upon the following assignment of errors occurring at the trial of said cause, to wit:

1st. That the verdict of the jury is against law.

2. That the court erred in sustaining the objection of plaintiff to the introduction by defendant of the copies of the notes or orders referred to in the pleadings as Exhibits A, B, & C, or to the introduction of any other testimony by defendant.

3d. The court erred in overruling defendant's objection to plaint-
23 iff's request that the jury be instructed to return a verdict for plaintiff.

4. The court erred in its instructions, and in the whole of these to the jury, and the same was against the law.

5. The court erred in rendering the judgement and in the whole thereof, that is rendered in favor of plaintiff against defendant.

PHILIP T. VAN ZILE AND
JAS. H. BEATTY,
Att'ys for Def't.

(Endorsed:) Title of court and cause. Notice of motion for new trial. Copy of within received this 29th day of Sept., 1881, J. L. Rawlins, att'y for pl'ff. Filed Sept. 29th, 1881. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Statement on motion for new trial.

In the district court of the 3d judicial district of Utah Territory.

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, plaintiff,
vs.
ORLANDO J. HOLLISTER, DEF'T.

This is an action to recover of defendant a certain sum of money
24 by him collected as U. S. assessor and collector, of plaintiff, as a Government tax on notes or orders alleged by defendant to have been issued and put into circulation as money by the plaintiff. The case was regularly called for trial on the 12th day of May, 1881, when a jury was regularly empaneled and duly sworn to try the cause. After plaintiff's counsel had stated its case to the jury, the counsel for defendant in open court admitted that the instruments annexed to the complaint in said action, and marked respectively Exhibits A, B, & C (being the same annexed to the proposed statement on motion for a new trial herein), are true and correct sample copies of all the instruments taxed, or for or on account of the use of which the assessment and collection of the money sought to be recovered in this action were made, and that no part of the said money had ever been refunded to plaintiff. Whereupon plaintiff rested its case.

Counsel for defendant then stated his case to the jury. It was
25 thereupon, in open court, agreed by counsel for the respective parties that the only questions in dispute were:

1. Whether the instruments, the terms and character of which had been admitted, were liable to the tax assessed against them.

2d. If so, whether they were in fact used for circulation as money, and paid out by plaintiff as money. Defendant's counsel claimed that said instruments, by their terms and face, were liable to the tax; for the purpose of proving the use which had been made of these instruments, and that they had been paid out by the plaintiff as money, offered in evidence a certain paper or return made by plaintiff to defendant as a United States collector for the district of Utah.

J. L. Rawlins, counsel for plaintiff, then and there interposed the following objections to the admission of said paper or return in evidence:

RAWLINS. I object to the admission of this paper in evidence, and to the admission of any evidence on the part of defendant in this case,
26 for the purpose of showing what use was made of the paper, the terms and character of which have been admitted in this case. I object—

First. On the ground that such evidence is immaterial.

Second. Because in the first instance the face of the instrument can be alone looked to for determining whether it came within the class taxable under the statute, and the instrument assessed in this case, according to the admitted facts, being all payable in chattels other than money, are not notes or circulation, and by their face and notices are incapable of taking the place or performing the functions of circulation of money, and are not taxable under the statute.

Third. Because said orders are not payable in money, and none of them are negotiable instruments or notes within the sense and meaning of the statute.

The court, after argument of said objections, took the same under
27 advisement, and by its order made on the 14th day of May, 1881, sustained *sustained* the said objections of plaintiff to the introduction of his testimony by the defendant. To which ruling of the court the defendant then and there excepted.

The defendant next proposed to prove (the plaintiff consenting) that the witness need not be placed upon the stand, and the offers to prove be made as if the witness were upon the stand and sworn in the case:

1. That these instruments were issued by this plaintiff, drawn upon one of its officers; and that they were used for circulation and paid out by plaintiff.

2. That they were used for circulation and paid out by plaintiff as money.

3. That they were so used by the plaintiff and paid out by the plaintiff as money.

4. That by reason of the circulation and use of these instruments by the plaintiff they displaced to a large extent the currency of the United States.

To each of which offers to prove the plaintiff's counsel then and there objected upon the same ground hereinbefore specified; which objec-
28 tions were sustained by the court. To which ruling of the court the defendant's counsel then and there excepted.

Defendant's counsel produced the assessment and return which had been before offered, which was then marked by the court Exhibit No. 1, and as such is hereto attached. Defendant having rested, the plaintiffs requested the court to instruct the jury as hereinafter stated. To which request to instruct the jury the defendant objected because of the objections already made in substance, and because, this being virtually a judgement against the United States, interest cannot be computed nor judgement given for it.

The court then gave the following instructions to the jury, to wit:

"Gentlemen of the jury, you will have to determine the case from the instructions of the court, and the court instructs you that it will be your duty to bring in a verdict for the plaintiff against the defendant for the sum of four hundred and fifty dollars, with interest thereon at
29 legal rate, from the 30' day of July, 1878; and for the further sum of nine thousand and fifty dollars, with legal interest thereon from the 1st day of Sept., 1878, and the clerk will prepare you a form of verdict."

To which order of the court overruling defendant's said objections, also to said instructions of the court to the jury, the defendant then and there objected. Whereupon the jury returned their verdict as follows, to wit:

In the 3d dist. court.

TERRITORY OF UTAH, *County of Salt Lake:*

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, pl'ff,
vs.
O. J. HOLLISTER, DEF'T.

We, the jury empaneled in the above case, find for the plaintiff as follows: For the sum of $450.00, with interest at 10 % per annum from

July 30, 1878, and the further sum of $9,050.00, with interest at 10 % per annum from Sept. 1st, 1878; total amount found for plaintiff, principal and interest, $12,056.55½ (twelve thousand and fifty-six and fifty-five and a half hundredths dollars).

(S'gn'd) FRANCIS COPE, *Foreman.*

MAY 14, 1881.

30 In pursuance of which verdict the court then, against the objections of defendant, rendered its judgment; to which the defendant then and there excepted.

Whereupon it was ordered by the court that the defendent have for the purpose of making and serving notice of, and preparing statements for, motion for a new trial the period of sixty days extended by order of the court to October 1, 1881, and all proceedings stayed accordingly.

The Exhibits A, B, & C above referred to, and being the same notes or orders attached to the complaint in this action as Exhibits A, B, & C, are made a part of this statement, and by the consent of the parties hereto are hereto attached in their original form as a part hereof.

And now upon the foregoing and as a part of this statement the defendant assigns errors of law which occurred at the trial, and then and there excepted to by defendant, as follows, to wit:

31 1. The court erred in sustaining the objection of plaintiff to defendant's introduction of said Exhibits A, B, & C, or any other evidence.

2. The court erred in overruling defendant's objections to plaintiff's request that the jury be instructed to return a verdict for plaintiff as asked by plaintiff.

3d. The court erred in instructing the jury that the case must be determined from the instructions of the court, and that they must bring in a verdict for plaintiff against defendant for the sums, with interest thereon, as set forth in said instruction above set out.

4. The court erred in rendering the judgement it did in this case.

5. The defendant further assigns as error that the verdict rendered by the jury is against law.

PHILIP T. VAN ZILE &
JAS. H. BEATTY,
Att'ys for Def't.

32 No. —.] *Series A.* [1.

SALT LAKE CITY, *Oct.* 16, 1876.

Pay David O. Calder, or bearer, one dollar in merchandize, at retail.

G. H. SNELL.

To H. B. CLAWSON,
Sup't Z. C. M. I.

(Indorsed:) Pl'ff' Exhibit A. Hunter, judge.

No. 318.] *Series A.* [5.

SALT LAKE CITY, *Oct.* 16, 1876.

Pay David O. Calder, or bearer, five dollars in merchandize, at retail.

G. H. SNELL.

To H. B. CLAWSON,
Sup't Z. C. M. I.

(Indorsed:) Pl'ff' Exhibit B. Hunter, judge.

No. 277.] *Series A.* [2.

SALT LAKE CITY, *Oct.* 16, 1876.

Pay David O. Calder, or bearer, two dollars in merchandize, at retail.

G. H. SNELL.

To H. B. CLAWSON,
Sup't Z. C. M. I.

(Indorsed:) Pl'ff' Exhibit C. Hunter, judge.

In the district court of the 3d judicial district of Utah Territory.

33 ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, pl'ff,
vs.
ORLANDO J. HOLLISTER, DEF'T.

We do hereby certify that we have examined the foregoing statement, and that it is correct; and it is hereby stipulated that the same may be used on motion for a new trial, also as the statement on any appeal that may be taken by either party to any appellate court; also we further stipulate that the Exhibits A, B, & C, attached to the foregoing statement, are sample copies of the notes or orders issued by plaintiff, and that said exhibits may be used in their original form as above attached in any proceeding that may hereafter be had in this cause in any court.

PHILIP T. VAN ZILE AND
JAS. H. BEATTY,
Att'ys for Def'ts.
J. L. RAWLINS,
Att'y for Pl'ff.

(Endorsed:) Title of court & cause, &c. Statement on motion for new trial. Filed Sept. 29th, 1881. O. J. Averill, clerk; by H. G. McMillan, deputy clerk.

34 *Order overruling motion for new trial.*

(Title of court & cause.)

The motion of defendant for new trial herein being now submitted to the court without argument, and the court advised, orders that the said motion for a new trial be, and the same is hereby, overruled and denied; to which ruling and order defendant duly excepted, and the court assigns as reasons for said overruling of said motion that the errors alleged in support of said motion do not exist.

JOHN A. HUNTER, *Judge.*

DEC. 16, 1881.

(Title of court and cause.)

To the clerk of said court and J. L. Rawlins, att'y of said plaintiff:

You will please take notice that the defendant in the above action hereby appeals to the supreme court of Utah Territory from the judgement

made and entered in the above-entitled action in said district court
35 on the 14th day of May, 1881, in favor of plaintiff and against defendant, and from the whole of said judgement; also said defendant appeals to said supreme court from the order of said district court, made on the 16th day of Dec., 1881, overruling the motion of said defendant for a new trial in said action, and from the whole therof.

PHILIP T. VAN ZILE AND
JAS. H. BEATTY,
Att'ys for Def't.

(Endorsed:) Title of cause and court. Notice of appeal. Received a copy of within notice subsequent to the filing of the same this 19th day of Dec., 1881. J. L. Rawlins, att'y for pl'ff. Filed Dec. 19th, 1881. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

Order dispensing with printed record.

(Title of court and cause.)

Upon application made and good cause being shown, it is ordered that on the appeal of the above entitled cause to the supreme court of
36 said Territory, a printed transcript may be dispensed with and a written transcript may be used in said supreme court.

JOHN A. HUNTER, *Judge.*

(Endorsed:) Filed Dec. 19th, 1881. O. J. Averill, clerk, by H. G. McMillan, dep'ty clerk.

Certificate.

In the district court of the third judicial district of Utah Territory.

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, pl'ff,
vs.
ORLANDO J. HOLLISTER, DEF'T.

We do hereby certify that the foregoing transcript on appeal from said district court to the supreme court of said Territory in the above-entitled action is correct, and the same may be used as the record on appeal to said supreme court without further authentication; also, the filing of an appeal bond is hereby waived.

PHILIP T. VAN ZILE AND
JAS. H. BEATTY,
Att'ys for def't and appellant.
J. L. RAWLINS,
Att'y for pl'ff and respondent.

(Indorsed:) Supreme court, Z. C. M. I., resp'd't, *vs.* O. J. Hollister, app'l't. Transcript. Filed Dec. 30, 1881. E. T. Sprague, clerk sup. court.

37 THURSDAY, *July 13th*, A. D. 1882.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment. Present, all the justices, the clerk, marshal, and members of the bar. Court was duly opened.

* * * * * * *

ZION'S CO-OP. MER. INST., RESPONDENT,
vs.
OVANDO J. HOLLISTER, APPELLANT. } From 3d dist.

This cause coming on regularly for hearing, was argued by Mr. Van Zile for appellant and Mr. Rawlins for respondent; submitted, and taken under advisement.

MONDAY, *June 18th, A. D.* 1883.

A session of the supreme court of Utah Territory was held this day, beginning at 12 o'clock m., pursuant to the proclamation of the governor. Present and presiding, his honor John A. Hunter, chief justice, his honor P. H. Emerson, associate justice, and his honor S. P. Twiss,
38 associate justice. Present also, E. T. Sprague, clerk; the marshal, and members of the bar. Court was duly opened.

* * * * * * *

ZION'S CO-OP. MER. INSTITUTION, RESPONDENT,
vs.
OVANDO J. HOLLISTER, APPELLANT. } From 3d dist.

This cause having been at a former term argued and submitted, and the court being sufficiently advised thereon, it is now here ordered and adjudged that the judgment of the district court therein be and the same is hereby affirmed, and that respondent have and recover of and from appellant dollars costs.

Thereupon said appellant, by P. T. Van Zile, his counsel, prayed the allowance of an appeal of said cause to the Supreme Court of the United States, and asked that the amount of a supersedeas bond, to be given thereon, be fixed. Ordered, that said appeal be, and hereby is, allowed, and the amount of such bond hereby fixed at $10,000. Proceedings stayed ninety days from date.

Emerson, J., dissents.

39 WEDNESDAY, *July 11th, A. D.* 1883.

A session of the supreme court of Utah Territory was held this day, beginning at 2 o'clock p. m., pursuant to adjournment. Present and presiding, Hon. John A. Hunter, chief justice; present also, Hon. P. H. Emerson, associate justice, the clerk, marshal, and members of the bar. Court was duly opened.

* * * * * * *

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, respondent,
vs.
O. J. HOLLISTER, APPELLANT. } From 3d dist.

This cause being for official acts of respondent as collector of internal revenue only, and the Treasury Department of the United States having

directed the removal thereof to the Supreme Court of the United States, and a writ of error and citation having been issued accordingly, and the latter duly served, now, on motion of P. T. Van Zile, U. S. attorney, it is ordered that bond, either for costs or damages on said writ, be
40 and is dispensed with; that remittitur and other proceedings for respondent in this and the 3d dist. court be stayed till further order herein.

41 *Copy of opinion.*

In the supreme court, Territory of Utah.

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, plaintiff and respondent,
vs.
O. J. HOLLISTER, DEFENDANT AND APPELLANT.

The plaintiff in its complaint alleges that it is, and was at the times therein mentioned, a corporation organized and existing under the laws of this Territory, solely for the purpose of carrying on a mercantile business; that the defendant at and during the same times was, and is, the acting collector of internal revenue for the United States. That in 1876 the plaintiff made certain mercantile orders of the denominations of one, two, and five dollars, which were used in paying its employees, who were willing to take their pay in merchandize, and also as a means of convenience in exchange for produce, which it was agreed should be paid for in merchandize, and that they were not made, or used, or paid, or circulated for any other purpose whatever; that upon the 25th day of July, 1878,
42 the United States Commissioner of Internal Revenue set down to and assessed against the plaintiff a special tax of ten per centum, amounting to $10,000, as a tax upon notes alleged to have been used by plaintiff for circulation and paid out by it for and during the two months ending on the 30th day of November, 1876, and between the 30th day of November, 1876, and the the 1st day of June, 1878. That the list containing said assessment was by said Commissioner of Internal Revenue placed in the hands of the defendant as such collector. That the defendant, on the 7th day of August, 1878, as such collector, demanded of the plaintiff the payment of the aforesaid tax, assessed as aforesaid, and threatened that unless payment of the same was made, he, the defendant, as such collector, would seize upon and sell sufficient of plaintiff's property to pay said tax; that while defendant was so threatening to sell and about
43 to sell the property of the plaintiff, the plaintiff, under protest and with notice then and there given by it to the defendant, that said tax was erroneous and illegal, and that suit by the plaintiff would be commenced against the defendant to recover the same, and to prevent the seizure and sale of plaintiff's property, as threatened by the defendant, paid to the defendant the amount of said taxes, the sum of $10,000.

That on the 25th day of September, 1879, the plaintiff, in due form of law, made its appeal to the Commissioner of Internal Revenue to have said sum assessed against, and paid by, the plaintiff refunded; that said Commissioner, on the 14th day of October, 1879, decided said appeal against the plaintiff, and refused to refund the same, or any part thereof, excepting five hundred dollars.

That the said assessment, demand for payment, and payment were made upon the said alleged merchandize orders, and upon no others, and for the use and circulation of them as above stated; that by reason
44 thereof there remains due and owing to the plaintiff from the defendant the sum of $9,500, with interest thereon.

The defendant in his answer alleges that the orders described in the complaint were printed on good paper, in their general appearance resembled bank notes, and would be taken and considered as such by the masses of the people, or as a circulating medium; that in addition to the words and figures given in the complaint as descriptive of said orders, the denomination of each of them appeared upon the face thereof, and across the same in their places in large letters and figures. Defendant denies that the plaintiff did not use, make, pay out, or circulate said notes or orders, except for the purpose of paying its employees, or as a means of convenience in exchange for produce, and, upon information and belief, says that during the months of October and November, 1876, and during the time from November, 1876, until July, 1878, the plaintiff issued its notes
45 or orders to the amount of one hundred four thousand and five hundred dollars, in substantially the form above described, and such form, material and appearance as to be readily taken and passed as money and a circulating medium.

That plaintiff paid out and issued said notes or orders to any and all persons who would accept them in payment of any debts arising by plaintiff for the produce, labor, or other commodities or causes the same as money; also received them in payment for goods or other commodities sold, or for debts due plaintiff; took and received said orders and notes the same as money, and again paid out said notes and orders in the course of trade the same as other money. That after the issue of said notes or orders by plaintiff they were used for circulation and as a circulating medium at Salt Lake City, as well as in other places in this Territory, by a large portion of the people in all their business transactions the same as money, and by them treated as money, and to a considerable extent said
46 notes and orders during the years 1876 to 1878, inclusive, did displace, as a circulating medium to the amount of such notes or orders, the lawful currency and money authorized by the Government of the United States, and denied there is the sum of $9,500.00, or any part thereof, or interest thereon, due or owing to the plaintiff; that the tax on assessment levied and collected of plaintiff were the same as assessed, levied, and collected on account of the issue and circulation of said notes and orders, and says that in the matters of said assessment and collection of said taxes, and in all he did connected therewith, he acted only by virtue of his authority as assessor and collector of the internal revenue of the Government of the United States, and under the direction of the proper officer of the United States Government.

Upon the trial it was admitted by the defendant that the sample copies annexed to the complaint were true and correct copies of all
47 the instruments taxed, or for or on account of the use of which the assessment and collection of the money sought to be recovered in this action were made, and that no part thereof had ever been refunded to the plaintiff. Thereupon the plaintiff rested its case.

The following is a copy of one of the instruments:

No. 318.] *Series A.*

SALT LAKE CITY, *Oct. 16th*, 1876.

Pay David O. Calder, or bearer, five dollars in merchandize, at retail.

G. H. SNELL.

To H. B. CLAWSON.

It was in open court agreed by counsel for the respective parties that the only questions in dispute were:

1. Whether the instruments, the terms and character of which had been admitted, were liable to the tax assessed against them.

2. If so, whether they were in fact used for circulation as money and paid out by the plaintiff as money.

Whereupon the plaintiff rested its case.

48 The defendant offered in evidence the return made by the plaintiff to the defendant, as the United States collector of the district of Utah, and offered to prove:

1. That these instruments were issued by the plaintiff, drawn upon one of its officers, and that they were used for circulation and paid out by plaintiff.

2. That they were used for circulation and paid out by plaintiff as money.

3. That they were so used by the plaintiff and paid out by the plaintiff as money.

4. That by reason of the circulation and use of these instruments by the plaintiff they displaced to a large extent the currency of the United States.

To all of which offers the plaintiff objected, and the objections were sustained by the court. At the request of the plaintiff, the defendant objecting, the court instructed the jury to find for the plaintiff in the full amount claimed by the plaintiff, with interest; to which instruction the defendant at the time excepted. The verdict was in compliance with the in-

49 structions. Judgement was entered accordingly. Motion for a new trial was filed and overruled, and appeal taken to this court.

The following is the statutory provision under which the assessment was made:

"That every person, firm, association, other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them." (Supplement to Rev. St., vol. 1, 1874–1881, p. 133, § 19.)

The material question of this case is, in what sense did Congress use the term "note" in this action.

To determine this question we are permitted to look at the subject-matter of the statute, as well as to the name given by it to the instrument.

A statute imposing a tax should be clear and unambiguous, and when by its terms, it clearly and without doubt, imposes a tax upon a particular class of property, it should not by a forced construction be held to include other property which is not with reasonable certainty included

50 by its language.

A citizen about to make investments or to engage in business

should be enabled by the exercise of ordinary judgment and discretion to know with reasonable certainty what his obligations under existing laws as a tax-payer may be, and the ordinary use and force of the language used; the obvious intention of the legislature will determine his rights and liabilities as to this matter. (Cooley on Taxation, 199–208.)

In cases where the language of the statute is so obscure as to cause "doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because a tax cannot be imposed without clear and express words for that purpose." (United States vs. Isham, 17 Wall, 504.)

There are many instruments properly called notes, but in matters of commerce the word note means an instrument recognized as a note in the mercantile sense of the word, a promise to pay money, unless the term is qualified.

51 "Notes used for circulation" are necessarily negotiable, and payable in money. They are intended to and do represent money, and do the work of money in business transactions, and on a day therein named become money. (1 Parsons on N & B., 42–45.)

A note of this description made and "paid out" by the plaintiff with the design and intention that it should be, and is, put into circulation, and does the work of money as a circulating medium, is clearly within the statute, and taxable; but an order to pay D. O. C., or bearer, five dollars in merchandize, at retail, is of another class or description of paper, which does not perform the office or function of money, and is not a note in the sense in which the word is used in the statute. (United States vs. Van Aukin, 96 U. S., 366.)

We are, for these reasons, of the opinion, that there was no proof that the respondent issued any notes within the intent and meaning of the statute; and that the court below did not err in excluding the

52 evidence offered by the appellant of the issuing and circulation by the respondent of its orders or promises to deliver merchandize and the other evidence offered by the defendant at the trial, and that there was no error in the instruction to the jury.

The judgement of the district court is affirmed.

STEPHEN P. TWISS, *A. J.*

Hunter, C. J., and Emerson, A. J., concur.

(Endorsements:) Supreme court. Zion's Co-operative Mercantile Institution, respondent, vs. O. J. Hollister, appellant. Filed June 23d, 1883. E. T. Sprague, clerk of sup. court. Recorded on pages 135 to 139 inc. Book A, Opinions. E. T. Sprague, clerk.

53 In the Supreme Court of the United States.

O. J. HOLLISTER, PLAINTIFF IN ERROR,
vs.
ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, defendant in error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of the judgement of a plea which is in the said supreme court before you, or some

of you, between Zion's Co-operative Mercantile Institution, plaintiff and respondent, and O. J. Hollister, defendant and appellant, a manifest error hath happened to the great damage to the said plaintiff in error, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and pro-
54 ceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the supreme court of Utah Territory, and the hand of the clerk of said last-named court, this 10th day of July, A. D. 1883.

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

55 THE UNITED STATES OF AMERICA, *ss:*

To Zion's Co-operative Mercantile Institution, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington City on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein O. J. Hollister is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgement rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John A. Hunter, chief justice of the supreme court of Utah Territory, this 11th day of July, in the year of our Lord eighteen hundred and eighty-three.

JOHN A. HUNTER,
Chief Justice of Utah Territory.

56 TERRITORY OF UTAH,
County of Salt Lake:

On this 12th day of July, A. D. 1883, before me, clerk of the supreme court of Utah Territory, personally appeared Philip T. Vanzile, who, being duly sworn, on his oath did say that he delivered on the day of July, 1883, at the county and Territory aforesaid, a true copy of the foregoing citation to J. L. Rawlins, esq., one of the attorneys of Zion's Co-operative Mercantile Institution.

E. T. SPRAGUE, *Clerk.*

Due service of the within and foregoing citation by delivery of a copy thereof this 11' day of July, 1883, is hereby admitted.

SHEEKS & RAWLINS,
Att'ys of Def't in Error.

(Indorsed:) Filed July 11th, 1883.

E. T. SPRAGUE, *Clerk.*

57 TERRITORY OF UTAH.

County of Salt Lake:

I, E. T. Sprague, clerk of the supreme court of the Territory of Utah, in pursuance of the writ of error hereto attached, herewith return to the Supreme Court of the United States a transcript of the record and proceedings, and opinion of said supreme court of Utah Territory, together with the original writ of error and the citation thereon, with proof of service of the latter endorsed thereon all in, and of the cause in said writ named, and I hereby certify that said transcript of the record, proceedings, and opinion, is a true, full, and correct copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory, this 14th day of July, A. D. 1883.

[SEAL.] E. T. SPRAGUE.
Clerk of Supreme Court.

(Indorsement on back): No. 907. Orlando J. Hollister, collector of internal revenue, plaintiff in error, vs. Zion's Co-operative Mercantile Institution. Utah Territory supreme court. Filed 23rd July, 1883.

111-62

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1152.

JONATHAN C. WILLIS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRTEENTH DISTRICT OF ILLINOIS, PLAINTIFF IN ERROR,

vs.

THE BELLEVILLE NAIL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 15, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1152.

JONATHAN C. WILLIS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRTEENTH DISTRICT OF ILLINOIS, PLAINTIFF IN ERROR,

vs.

THE BELLEVILLE NAIL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois, before you, between the Belleville Nail Company, plaintiff, and Jonathan C. Willis, collector of internal revenue for the thirteenth district of Illinois, defendant, a manifest error hath happened to the great damage of the said defendant, Jonathan C. Willis, collector, &c., as by his complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings afore-
2 said, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 30th day of August, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth year.

[SEAL.] J. A. JONES,
Clerk Circuit Court of United States
for Southern District of Illinois.

(Indorsed:) No. 6247. Supreme Court of the United States. Jonathan C. Willis, collector internal revenue 13th district of Illinois, plaintiff in error, vs. Belleville Nail Company. Writ of error. Filed August 30, 1883. J. A. Jones, clerk.

3 *Placita.*

Pleas in the circuit court of the United States of America, in and for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and, in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit of the United States, pro tempore, sole judge of said circuit court, on Saturday the 4th day of August, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth year.

J. A. JONES, *Clerk.*

1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois, before you, between the Belleville Nail Company, plaintiff, and Jonathan C. Willis, collector of internal revenue for the thirteenth district of Illinois, defendant, a manifest error hath happened to the great damage of the said defendant, Jonathan C. Willis, collector, &c., as by his complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings afore-
2 said, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 30th day of August, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth year.

[SEAL.] J. A. JONES,
Clerk Circuit Court of United States
for Southern District of Illinois.

(Indorsed:) No. 6247. Supreme Court of the United States. Jonathan C. Willis, collector internal revenue 13th district of Illinois, plaintiff in error, vs. Belleville Nail Company. Writ of error. Filed August 30, 1883. J. A. Jones, clerk.

3 *Placita.*

Pleas in the circuit court of the United States of America, in and for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and, in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit of the United States, pro tempore, sole judge of said circuit court, on Saturday the 4th day of August, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth year.

J. A. JONES, *Clerk.*

THE BELLEVILLE NAIL COMPANY
vs.
JONATHAN C. WILLIS, COLLECTOR OF internal Revenue for the 13th district of Illinois. } 6247. Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS *ss:*

4 The Belleville Nail Company, a corporation residing in and a citizen of the State of Illinois, plaintiff in this suit, puts in its place Messrs. Charles W. Thomas and James M. Dill, its attorneys, against Jonathan C. Willis, collector of internal revenue for the 13th district of the State of Illinois, defendant, in a plea of trespass on the case on promises.

SOUTHERN DISTRICT OF ILLINOS, *ss:*

Be it remembered that heretofore, to wit, on the 5th day of December, in the year of our Lord one thousand eight hundred and eighty-one, came the plaintiff, by its attorney, and filed in the office of the clerk of said court its praecipe for summons in said cause, whereupon a summons was issued; which summons, together with the return of the marshal thereto, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss:

The United States of America to the marshal of the southern dis-
5 trict of Illinois, greeting:

We command you to summon Jonathan C. Willis, collector of internal revenue for the 13th district of Illinois, if found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto the Belleville Nail Company of a plea of assumpsit, to its damage, as it alleges, of three thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this fifth day of December, in the year of our Lord one thousand eight hundred and eighty-one, and of our Independence the one hundred and sixth year.

[L. S.] J. A. JONES, *Clerk.*

Marshal's Return.

Duly executed this writ by reading same to the within-named
6 Jonathan C. Willis as I am therein commanded.

Cairo, Ills., Dec. 8th, 1881.

JACOB WHEELER,
U. S. Marshal,
By P. SAUP, *Deputy.*

(Endorsed:) Filed December 17, A. D. 1881. J. A. Jones, clerk.

And afterwards, to wit, on the 30th day of December, in the year last aforesaid (A. D. 1881), came the plaintiff, by its attorneys, and filed in said cause its declaration; which declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court of the United States, January term, A. D. 1882.

The Belleville Nail Company, plaintiff, by Charles W. Thomas and James M. Dill, its attorneys, complains of Jonathan C. Willis, collector of the internal revenue of the United States for the thirteenth district of the State of Illinois, defendant, of a plea of trespass on the
7 case on promises; for that whereas the plaintiff, being at the time a corporation of said State engaged in the business of manufacturing and selling iron nails at the city of Belleville, to wit, at the district aforesaid, did, between the first day of April, A. D. 1879, and the first day of December, A. D. 1879, issue and deliver to its employees and servants by it hired at that time, in and about the furtherance and prosecution of its said business, in payment for their services in that behalf, and for no other purpose or consideration, certain of its scrip or obligations, to the aggregate amount of fifteen thousand six hundred and ninety-two dollars and seventy cents, all of which scrip was in the following and no other form:

OFFICE OF THE BELLEVILLE NAIL COMPANY,
Belleville, Ills., 187 .

J. C. Waugh & Bros.:
Please pay to the bearer (dollars or cents) at the store in merchandise on surrender of this order.

JAS. WAUGH, *Pres't.*

JAS. C. WAUGH, Sec'y.

And plaintiff avers that the firm of J. C. Waugh & Bros. was, during the time aforesaid, a partnership firm engaged in the business of selling groceries and provisions in said city, and was, by an arrangement with
8 plaintiff, empowered to take up said orders as presented to said firm by any bearer or bearers thereof, and to give in exchange therefor such merchandise kept for sale by said firm as the said bearer was by the terms of any such order, so presented to said firm, entitled to have.

And plaintiff avers that in the month of February, A. D. 1880, one Green B. Raum, United States Commissioner of Internal Revenue, without any warrant of law, assessed a tax upon plaintiff on account of the issuance of said scrip or obligations and the paying out of the same by plaintiff as aforesaid, of $1,569.27; and that defendant as such collector notified plaintiff on the 19th day of February, A. D. 1880, of the assessment of said tax as aforesaid, and that the same was payable on or before February 28th, 1880, and unless the same should be paid within said time it would become defendant's duty to collect the same with a penalty of five per cent. additional, and interest at one per centum per month.

And plaintiff avers that it refused to pay the said illegal tax, and persisted in said refusal, and that on the 11th day of July, A. D. 1881, the

defendant, as such collector, caused the personal property of the
9 plaintiff at said city, of great value, to wit, of the value of $12,000, to be levied upon and distrained for the satisfaction of said pretended tax, with interest and penalties, amounting in all at that time to $1,820.35; and that the plaintiff, on the 12th day of July, A. D. 1881, in order to procure a release of said personal property from said levy and distraint, and protesting that the said tax, penalty, and interest were no legal charge against it, the said plaintiff, and that said tax was illegally assessed, paid to the defendant the said sum of $1,820.35, the aggregate amount of said illegal tax, penalty, and interest, and the further sum of $3.75, the costs of said levy and distraint, being in all the sum of $1,824.10.

And plaintiff avers that on, to wit, the day last aforesaid it appealed the said matter to the said Commissioner of Internal Revenue, and claimed that the said tax was illegally assessed, and that the said tax, penalty, interest, and costs, amounting in the aggregate to the said sum of $1,824.10, ought to be refunded to plaintiff in pursuance of the forms of the statute in such cases made and provided, and praying that the same might
10 be so refunded, and that the said commissioner, on the 11th day of November, A. D. 1881, decided that the said tax was legally assessed and collected, and denied and refused plaintiff's claim to have said last-named sum, or any part thereof, refunded to it, the said plaintiff.

And in consideration of the premises, defendant being indebted to plaintiff, on account of the facts and circumstances hereinbefore stated, in the said sum of $1,824.10, faithfully promised the plaintiff, to wit, at the district aforesaid, to pay it, the said sum, whenever he, the said defendant, should be afterwards thereunto requested; yet the defendant, though often since that time by the plaintiff thereunto requested, has not paid plaintiff said last-named sum of money, nor any part thereof, to plaintiff's damage of three thousand dollars, and therefore it brings its suit, &c.

CHARLES W. THOMAS,
JAMES M. DILL,
Plaintiff's Attorneys.

(Endorsed:) Filed December 30, 1881. J. A. Jones, clerk.

11 And afterwards, to wit, on the 4th day of January, in the year of our Lord one thousand eight hundred and eighty-two, came the defendant, by his attorney, and filed in said cause his plea; which plea is in the words and figures following, to wit:

Plea.

THE UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In circuit court, January term, A. D. 1882.

JOHNATHAN C. WILLIS, COLLECTOR OF INTERNAL REVENUE of the United States for 13th district of Illinois,
ads.
THE BELLEVILLE NAIL COMPANY.

The defendant, as collector of internal revenue of the United States for the 13th district of the State of Illinois, by his attorney, James A. Con-

nolly, duly authorized thereto by the Commissioner of Internal Revenue, comes and defends, &c., and says he did not undertake and promise in manner and form as the said plaintiff hath in its said declaration complained against him, and of this he puts himself upon the country.

12

JAMES A. CONNOLLY,
U. S. Att'y for Def't.

(Endorsed:) Filed January 4, 1882. J. A. Jones, clerk.

And afterwards, to wit, on the 29th day of June, in the year last aforesaid, came the parties, by their attorneys, and filed a stipulation waiving jury; also came the defendant, by his attorney, and filed copy of letter of Commissioner of Internal Revenue; which said stipulation and letter of Commissioner are in the words and figures following, to wit:

Stipulation waiving jury.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court of the United States, to the June term thereof, A. D. 1882.

THE BELLEVILLE NAIL COMPANY
vs.
JONATHAN C. MILLS, COLLECTOR, &C. } Assumpsit.

It is agreed and stipulated by and between the said parties, that said cause shall be submitted to the court for trial, a jury being waived.

13

CHARLES M. THOMAS,
Att'y for Plaintiff.
JAMES A. CONNOLLY,
Att'y for Def't.

(Endorsed:) Filed June 29, A. D. 1882. J. A. Jones, clerk.

Copy of letter of Comm'r Int. Revenue.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, Nov. 11th, 1881.

J. C. WILLIS, Esq.,
Collector 13th District, Cairo, Illinois:

SIR: The claim of the Belleville Nail Company for the refunding of 1,824.10 tax, with interest, paid on "the amount of its own notes or obligations used for circulation and paid out by it" between April 1st, 1879, and December 31st, 1879, is hereby rejected, for the reason that the tax was legally assessed and collected.

Respectfully,

14 (Signed) GREEN B. RAUM,
Commissioner.

(Endorsed:) Filed June 29, 1882. J. A. Jones, clerk.

And afterwards, to wit, on Thursday, the 7th day of June, at the June term of said court, in the year one thousand eight hundred and eighty-three, the following proceedings were had in said cause, and entered of record as follows, to wit:

Rule on defendant to file brief.

BELLEVILLE NAIL COMPANY
vs. } Assum'sit.
JONATHAN C. WILLIS, collector, &c.

On motion of plaintiff, by C. W. Thomas, esq., its attorney, the defendant is ruled to file his brief herein by the 20th of June inst.

And afterwards, to wit, on Saturday, the 4th day of August, at the term and in the year last aforesaid, the following further proceedings were had in said cause at said court, and entered of record as follows, to wit:

Verdict and judgment for plaintiff.

BELLEVILLE NAIL COMPANY
vs.
JONATHAN C. WILLIS, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE 13TH DISTRICT OF ILLINOIS. } Assumpsit.

And now, on this 4th day of August, 1883, come the parties, by their counsel, and also comes a jury, to wit; Thomas H. Bergen, Alexander Reynolds, D. C. Brinkerhoff, Charles Fisher, J. S. Kennedy, Patrick Higgins, Jonathan Biggs, J. W. McNeil, D. G. Kalb, William M. Lochr, James H. Palmer, and Thomas Thorpe, who, being sworn well and truly to try the issues, after hearing the evidence and charge of the court, for verdict say: "We find the issue for the plaintiff, and assess its damages to the sum of two thousand and forty-five dollars and forty-five cents."

It is therefore ordered by the court that the plaintiff recover of the defendant the said sum of two thousand and forty-five dollars and forty-five cents, together with its costs herein expended, and that it have execution therefor.

And thereupon the defendant tenders his bill of exceptions, which is signed and ordered to be made part of the record.

16 And on motion of the defendant a writ of error to the United States Supreme Court is allowed him on his entering into bond to the plaintiff in the penalty of five hundred dollars, and conditioned as the law directs, within sixty days from this date.

And afterwards, to wit, on the day last aforesaid, at the term and in the year last aforesaid, was filed the following "bill of exceptions," which were signed by the court and ordered to be made part of the record herein,

which said bill of exceptions are in the words and figures as follows, to wit:

Bill of exceptions.

THE BELLEVILLE NAIL COMPANY
vs.
JONATHAN C. WILLIS, &c. } Assumpsit.

Be it remembered that on the trial of this cause there was read in evidence a stipulation in writing, as follows:

Stipulation as to facts.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court of the United States, June Term, A. D. 1882

17 THE BELLEVILLE NAIL COMPANY
vs.
JONATHAN C. WILLIS, COLLECTOR OF THE INTERNAL REVENUE OF THE UNITED STATES FOR THE THIRTEENTH DISTRICT OF THE STATE OF ILLINOIS. } Assumpsit.

It is agreed and stipulated between said parties that the allegations of facte ontained in the plaintiff's declaration are true, and that the scrip therein mentioned, between the dates first therein mentioned, actually circulated among the tradesmen of the said city of Belleville in lieu of money.

CHARLES W. THOMAS,
Att'y for Plaintiff.
JAMES A. CONNOLLY,
U. S. Att'y, for Defendant.

And it also appeared in evidence that the amount collected by the defendant from the plaintiff was paid into the U. S. Treasury. This was all the evidence in the case.

The court instructed the jury that the plaintiff was entitled to recover the amount collected by defendant from plaintiff and interest thereon, to the giving of which instruction the defendant at the time excepted.

(Signed) S. H. TREAT,
District Judge.

18 (Endorsed:) Filed August 4, 1883. J. A. Jones, clerk.

And afterwards, to wit, on the 27th day of August, in the year last aforesaid, came the defendant, by his attorney, and filed in said cause an appeal bond; which said appeal bond is in the words and figures following, to wit:

Writ of error bond.

THE BELLEVILLE NAIL COMPANY
vs.
JONATHAN C. WILLIS, COLLECTOR OF INTERNAL revenue for the 13th district of Illinois.

In circuit court, southern district of Illinois.

Know all men by these presents that we, Johnathan C. Willis, as principal, and William J. Ward as surety, are held and firmly bound unto the Belleville Nail Company in the sum of five hundred dollars, to be paid to the said Belleville Nail Company, to which payment we bind ourselves, jointly and severally, and our heirs, executors, and administrators,
19 firmly by these presents. Whereas the above-named Johnathan C. Willis hath prayed an appeal to the Supreme Court of the United States, by direction of the Commissioner of Internal Revenue, to reverse the judgment rendered in the above-entitled suit, by the circuit court of the United States for the southern district of Illinois; therefore the conditions of this obligation is such that if the above-named Johnathan C. Willis shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his appeal, then this obligation to be void; otherwise in full force.

Witness our hands and seals this 21st day of August, A. D. 1883.

JONATHAN C. WILLIS. [L. S.]
WILLIAM J. WARD. [L. S.]

Approved.

S. H. TREAT,
Dist. Judge.

20 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern district of Illinois, ss:

I, John A. Jones, clerk of the circuit court of the United States, within and for said southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed, and the proceedings thereon had, in a certain cause lately pending in said court, wherein the Belleville Nail Company was plaintiff and Jonathan C. Willis, collector of internal revenue for the 13th district of the State of Illinois, was defendant, as fully as the same appear of file and on record in my said office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Springfield, in said district, this 25th day of September, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth year.

[SEAL.] J. A. JONES, *Clerk.*

21 *Citation.*

Supeme court of the United States.

The United States of America to the Belleville Nail Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein Jonathan C. Willis, collector of internal revenue for the 13th district of Illinois, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties aforesaid in that behalf.

Witness the Hon. S. H. Treat, district judge of the United States for the southern district of Illinois, at Springfield, in said district, this 1st day of September, in the year of our Lord 1883, and of our Independence the 108th year.

S. H. TREAT,
District Judge, U. S. South'n Dist. of Ills.

I hereby acknowledge due service of this citation on me.

CHARLES WAIT THOMAS,
Att'y for Def't in Error.

(Indorsed): Supreme Court of United States, Jonathan C. Willis, collector, &c., 13th dist. of Illinois, plaintiff in error, vs. Belleville Nail Company, deft., in error. Citation.

(Indorsment on cover:) No. 1152. Jonathan C. Willis, collector of internal revenue for the thirteenth district of Illinois plaintiff in error, vs. The Belleville Nail Company. S. Illinois C. C. U. S. Filed 15th October, 1883.

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FILED
FEB 27 1884
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

HOLLISTER, COLLECTOR
v.
ZION'S CO-OPERATIVE MERCANTILE INSTITUTION. } No. 907.

WILLIS, COLLECTOR,
v.
BELLEVILLE NAIL CO. } No. 1152.

BRIEF FOR THE PLAINTIFFS IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

HOLLISTER, COLLECTOR
v.
ZION'S CO-OPERATIVE MERCANTILE INSTITUTION. } No. 907.

WILLIS, COLLECTOR,
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WILLIS, COLLECTOR,
v.
BELLEVILLE NAIL CO. } No. 1152.

BRIEF FOR THE PLAINTIFFS IN ERROR.

These cases resemble each other in being originally suits to recover taxes exacted by collectors of internal revenue from the defendants in error, because of the *using for circulation and paying out* by the latter of certain scrip supposed by the collectors to be "notes" within the mean-

ing of section 19 of the statute of 1875, ch. 36, which is in these words:

> "That every person, firm, association other than national-bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten percentum on the amount of their own notes used for circulation and paid out by them." (*Rich. Supp.*, 133.

[*Records* required in the supreme court of Utah upon appeals are made up under a statute which allows, as one alternative, parties or their attorneys to agree, as here, upon a statement of what passed below, to be signed and certified by them, and annexed to the record of the judgment. (Compiled Laws of Utah (1876), p. 493, ss. 1555, 1558, 1559, and 1565.)]

Inasmuch as there seems to be little to say about No. 1152, above, I will consider it first in order:

I.

In the *Belleville Nail Company* case the scrip was as follows: (Record, p. 3.)

> OFFICE OF THE BELLEVILLE NAIL CO.,
> *Belleville, Ills.*, 187—.
>
> J. C. WAUGH & BROS.:
>
> Please pay to the bearer [dollars or cents] at the store in merchandise on surrender of this order.
>
> JAS. WAUGH, *Pres't.*
>
> JAS. C. WAUGH, *Sec'y.*

For the purposes of trial the allegations of the declaration were admitted to be true; and it was also admitted that the scrip in question had actually circulated from April 1 to December 1, 1879, among the tradesmen of Belleville, in lieu of money. (Record, p. 7.)

The material allegations of the declaration were that the company, being a corporation engaged in making and selling nails at Belleville, issued to its employés, between April 1 and December 1, 1879, in payment of their services, scrip in the above form, to the aggregate amount of $15,692,70, "J. C. Waugh & Bros." being a grocery and provision firm at Belleville "empowered" to take up said orders when presented by the bearer, and to give in exchange therefor merchandise. Demand of tax, exaction, appeal to the commissioner, and rejection thereof were also alleged and admitted. (Record, pp. 3 and 4.)

Thereupon the court instructed the jury that the plaintiff was entitled to recover; and the defendant excepted. (P. 7.) Verdict and judgment accordingly ($2,045.46). (P. 6.)

This judgment is now assigned for error.

Inasmuch as there is no statement or admission that the company "used [such scrip] for circulation and paid it out," the above assignment is submitted, without more.

II.

In the case of *Zion's Co-operative Mercantile Institution* the scrip was as follows: (P. 3.)

652.] SERIES A. [5.

SALT LAKE CITY, *Oct.* 6, 1876.

Pay David O. Calder, or bearer, five dollars in merchandize, at retail.

Five. Five.

G. H. SNELL.

To H. B. CLAWSON,
Supt. Z. C. M. I.

The complaint of the company stated that it had "made and used such orders for the purpose of paying its employés when they were willing to take their pay in merchandise, and also as a means of convenience in exchange for produce which it was agreed should be paid for in merchandise." It also stated the exaction of $10,000 for tax, an appeal to commissioner, and rejection, &c.

Upon the trial evidence was tendered by the collector to show—

1st. That these instruments were issued by the plaintiff, drawn upon one of its officers; and that they were used for circulation and paid out by plaintiff.

"2d. That they were used for circulation and paid out by plaintiff as money.

"3d. That they were so used by the plaintiff and paid out by the plaintiff as money.

"4th. That by reason of the circulation and use of

these instruments by the plaintiff they displaced to a large extent the currency of the United States.

"To each of which offers to prove, the plaintiff's counsel then and there objected, upon the same ground hereinbefore specified; which objections were sustained by the court. To which ruling of the court the defendant's counsel then and there excepted.

"The court thereupon instructed the jury to find a verdict for the plaintiff, and the defendant excepted."

Verdict and judgment accordingly for $9,500, &c.

Upon an appeal to the supreme court of the Territory, that judgment was affirmed.

For error, the plaintiff in error assigns—

1. The rejection of evidence as above.
2. The instructions to the jury, and—
3. The judgment in favor of the "Institution."

These assignments will be argued together, as but one point is involved therein.

In view of what was proved as to the character of the scrip in question, and of what it was proposed by the collector to prove (*rejected* by the court as immaterial), it is to be assumed upon this argument that the scrip was—*Orders by the "Institution" upon one of its own officers to pay certain amounts of money in merchandise, used for circulation and paid out by the "Institution;"* with the practical effect of displacing to a large extent currency of the United States.

The case, therefore, is one of an actual creation of a new circulating medium accepted within a certain locality, and operating to exclude from that locality the national currency. This supplies a defect in Veilson Case 106 U.S. 620.

So far as the policy of the United States may be gathered to intend one universal and stable currency throughout all their territory, with a prohibition of all local and doubtful currencies, no question can be made that the scrip in question violates such policy.

Whatever doubts might have been entertained *a priori* as to the likelihood that *scrip for sums of money payable in goods* COULD become currency, would of course be doubts not as to a matter of *law*, but as to a matter of mere *fact*, and therefore must disappear before the establishment of such fact. The fact here illustrates, what it is submitted was otherwise true, that any suggestions upon the part of learned judges that may be found "in the books," to the effect that paper payable otherwise than in money *cannot* become currency, exhibit only their own views of what is *sound finance*, and do not lay down a proposition of *law*. The matter is not one within the domain of law.

It is also submitted that the scrip in question is the "Institution's" own "notes," within the meaning of section 19 of the act of 1875, first above quoted; for

1. The word "notes" as a term of art includes instruments for money *payable in specific articles* no less than such as, to use a familiar phrase, are "within the Statute of Ann," or, in other words, are payable in money absolutely.

2. The scrip in question, being orders upon an officer of the "Institution," issued by itself, are not the less also upon that account substantially "notes."

1. The word "notes," as a term of art, includes instruments for money, *payable in specific articles*, no less than such as are payable in money absolutely.

It is only the general subject-matter, or the context of any passage in which the word occurs that can determine that it includes *only* the ordinary commercial note.

The general *subject-matter* here is "circulation;" and the only *context* is one implied, as to the capacity of the "note" in question for becoming a circulating medium. All points suggested in this connection being conceded by the record to the collector, the only inquiry remaining under this topic is whether the word "note" taken *per se* signifies, amongst other things, an instrument for *a certain amount of money payable in specific articles.*

It is submitted that any impression that the word "note" has no such signification is derived from the circumstance that questions before the courts upon *notes* are generally questions directly or indirectly upon the statute of Ann, or its representatives in this country, *which statutes rigidly define the sort of notes upon which they operate:* that is, *note*. They do not operate upon *all notes signed and making promises to pay*, but only *all notes signed and making promises to pay a* SUM OF MONEY; thus indicating upon their face the existence of "notes" which promise to pay other things than money.

The ordinary language of judicial opinions, when discussing such notes, is to the same effect.

For example:

Irvine *vs.* Lowry (14 Pet., 293): "The only evidence of any transfer of the contents of the note [one for $53,000 payable 'in the office notes' of a certain bank, and held not to be a 'promissory note'] is the blank instrument [&c., &c.], in the latter of which it is stated that the note was received," &c.

Jerome *vs.* Whitney (7 Johns., 321): "This is not a promissory note under the statute, for it is payable in 'neat cattle,' and it therefore required a consideration to be stated, either by showing the acknowledgment of one upon the face of the *note*, or otherwise, by particularly averring it," &c.

Thomas *vs.* Roose (*Ib.*, 461). Where the "note" was for $85, payable in "a good horse," &c.

Peay *vs.* Pickett (1 Nott & McCord, 254). Where the "note" was for the payment of "six hundred bushels of corn."

Lawrence *vs.* Dougherty (5 Yerger, 435). A case of a "note" for $557.50, payable in "good cotton."

So, Van Auken's case (96 U. S., 366); Barnes *vs.* Graham (4 Cowen, 452); Smith *vs.* Loomis (7 Conn., 110); Wyman *vs.* Winslow (2 Fairf., 398); Bailey *vs.* Simonds (6 New Hamp., 159); Rockwell *vs.* Rockwell (4 Hill, N. Y., 164); McCartney *vs.* Smalley (11 Iowa, 85); Conwell *vs.* Pumphrey (9 Ind., 135); Smith *vs.* Barnes (24 Geo., 442); Gushee *vs.* Eddy (11 Gray, 502); Warren *vs.* Brown (64 N. C., 381); Smith *vs.* Giegrich (36 Mo., 369).

In all of these cases the word *note* is applied *passim*,

expressly to include contracts to pay certain amounts of money *in specific articles.*

I have found no case uninfluenced by the statute of Anne, that denies the applicability of the word "note" to such promises.

I conclude, therefore, that according to professional *usus loquendi*, and that in the highest quarters, the word "*note*," when uninfluenced by general subject-matter or context, includes in its meaning notes for money payable in specific articles, and therefore, *a fortiori*, that the medium in which the scrip now before the court is payable does not except it from the operation of the statute first-above quoted.

2. The scrip in question, being in the form of *orders upon an officer of the "institution," issued by itself*, is not the less also upon that account, substantially "notes."

It will be observed that the statute under consideration imposes no disability upon the instrument affected by it. Its sole operation is to impose a tax upon the party whose note it is, and who uses it for circulation and pays it out. No matter whether such tax has been paid or not the instrument remains good in the hands of the holder. The tax creates a collateral debt only. There can therefore be no reason why in every case the substantial *legal* character of the paper should not be determined, even by resorting to extrinsic matters of fact. A taxpayer who gets the full benefit of a transaction as having a certain character *in the eye of the law* cannot avoid whatever tax is imposed upon such character, by merely veiling it.

If the tax operated also upon the *res*, requiring, for example, that a stamp indicating *payment* should be affixed to its face, and that if not so affixed the instrument should be *void*, no extrinsic facts could be admitted to show that what is upon its face (say) *a bill* is really *a note*. The apparent interests of the public would demonstrate that the instrument subject to a stamp must *upon its face* be such that third parties can tell by bare inspection that it is so subject.

Such was Isham's case (17 Wall., 497), cited by the learned court below. The internal-revenue act of 1864 (13 Stat., 298) required promissory notes to be stamped; under a certain pecuniary penalty for non-compliance, the note in such case also to be *void*. The question was, whether an order for money drawn by A upon B could, for the purpose of exacting a penalty, be shown *by extrinsic evidence* to have been drawn by A *as one officer of a company* against B *as another such officer*. Thereupon the court said, "In the language of the statute [the instrument] shall be deemed invalid and of no effect: Is every man to whom a paper in the form of a bill of exchange is presented bound to inquire whether there are not outside circumstances that may affect its nature?" and, after discussing this question, it concluded, "That the rule contended for is impracticable in a commercial country is too obvious to require further illustration."

Here, however, as is submitted, every substantial consideration requires that the truth of the transaction, and its character in point of law, shall be open to free inquiry.

Taking this for granted, reason and authority for holding the scrip in question to be the *note* of the "Institution" are abundant:

Miller *vs.* Thompson (3 Man. and Gr., 576) is everywhere cited as a leading authority upon this subject. This case is also to be found in 1st Ames' Cases, &c., on Bills and Notes, 138; with a citation in a note at its end, of eleven English and American cases to the same effect. Upon reference thereto I have found these citations apposite.

In Miller *vs.* Thompson certain directors (through the manager) drew at Dorking an order for £100 upon their company in London. Tindal, *C. J.*, said, "There is an absence of the circumstance of there being two distinct parties as drawer and drawee, which is essential to the constitution of a bill of exchange. That being so the only alternative is that this instrument is a promissory note, and is properly declared upon as such." And Maule, *J.*, added, "It is a promise made by the company at Dorking to pay in London. It is therefore in effect a promissory note."

In Hasey *vs.* White Pigeon Company, 1 Douglass (Mich.), 193, the trustees of the company (through the president) drew an order for $13 upon its treasurer. The court said, "It has been held that such a bill is in legal effect a promissory note. * * * It must be understood to be a promise to pay the amount presently; an acknowledgment of an immediate and unconditional indebtedness, for which the plaintiff had a right to bring his suit at once."

The citation of authorities by Ames is as follows: "Roach *vs.* Ostler (1 M. & Ry., 120); Dickinson *vs.* Valpy (5 M. and Ry., 126); Allen *vs.* Lea Ins. Co. (9 C. B., 574); Bailey *vs.* S. W. Bank (11 Fla., 266); Wardens *vs.* Moore (1 Ind., 289); Marion R. R. *vs.* Hodge (9 Ind., 163); Indiana R. Co. *vs.* Davis (20 Ind., 6); Chicago R. Co. *vs.* West (37 Ind., 211); Manx Ferry Co. *vs.* Branegan (40 Ind., 361); Fairchild *vs.* Ogdensburg R. Co. (15 N. Y., 337); Bull *vs.* Sims (23 N. Y., 570), *accord*.

"See Dougal *vs.* Cowles (5 Day, 611); Cribbs *vs.* Allen (13 Gray, 597); Gilstrap *vs.* St. Louis R. Co. (50 Mo., 491)."

I also refer to Story, Notes, sec. 16; and Daniel, Negotiable Instruments, 1, sec. 129; citing also Willan *vs.* Ayres (3 App. Law Rep'ts, 133).

S. F. PHILLIPS,
Solicitor-General.

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Supreme Court of the United States.

OCTOBER TERM, 1883.

ORLANDO J. HOLLISTER, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT.

J. L. RAWLINS, ATTORNEY FOR DEFENDANT.

ATTORNEY GENERAL FOR PLAINTIFF IN ERROR.

Supreme Court of the United States,

OCTOBER TERM, 1883.

No. 907.

ORLANDO J. HOLLISTER, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR.

vs.

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION, DEFENDANT.

J. L. RAWLINS, FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action was brought by the respondent in the court below, to recover money paid by it under protest to the plaintiff in error, the same having been demanded and collected by him as Collector of Internal Revenue, as a tax assessed against defendant in error on account of the alleged use of certain instruments as circulation, sample copies of which will be found in the record.

At the trial below, it was admitted that the Exhibits "A," "B," and "C," in the record, were correct sample copies of all the instruments taxed in this case. It was further agreed in open court, between counsel for the respective parties, that the only questions in dispute were:

1st. Whether the instruments, the terms and character of which had been admitted, were liable to the tax assessed against them.

2nd. If so, whether they had in fact been used by plaintiff for circulation, and paid out by it as money.

For the purpose of proving the affirmative of the latter question, the plaintiff in error [the defendant below] offered in evidence the return, marked Exhibit 1 in the record, to the admission of which the following objections were interposed:

By Rawlins:

I object to the admission of this paper in evidence, and to the admission of any evidence on the part of the defendant in this case, for the purpose of showing what use was made of the paper, the terms and character of which have been admitted in this case.

I object, *First.* On the ground that such evidence is immaterial.

Second. Because, in the first instance, the face of the instrument can be alone looked to for determining whether it comes within the class taxable under the statute, and the instruments assessed in this case, according to the admitted facts, being payable in chattels other than money, are not notes or circulation, and by their face and nature are incapable of taking the place or performing the functions of circulation of money, and are not taxable under the statute.

Third. Because said orders are not *notes* as contemplated by the statute."

Fourth. Because said orders are not payable in money, and none of them are negotiable instruments or notes within the sense and meaning of the statute.

These objections were sustained by the court, and the proposed evidence excluded.

This ruling is claimed as error, and raises the substantial question in the case:

Whether the instruments, on account of their terms, form and nature, are embraced within the statute under the alleged authority of which the tax in question was assessed.

This statute is Sec. 19 of the Act of Congress of Feb. 8th, 1875, (18 Stat. 311) and reads as follows:

"SEC. 19. That every person, firm, association, other

than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of *ten per centum* on the amount of their own *notes* used for circulation and paid out by them."

The *notes* mentioned in this section are subsequently referred to in the same act as "*such circulating notes.*" (Sec. 21.)

BRIEF OF ARGUMENT.

Instruments, to be taxable (however used) under this statute, must be such that, by their terms and face, they properly come within the designation of *notes*, and are legally capable of becoming "circulating notes," in the sense in which these words are employed in this act of Congress.

The instruments in question are not notes; but come precisely within the legal definition of *order*, which is given by Bouvier in this language: "An informal bill of exchange on paper, which requires one person to pay or deliver to another goods on account of the maker, to a third party, is called an *order*. (2 Bouvier Law Dic., Title "Order." Hinnerman *v.* Rosenback, 39 N. Y., 100.)

These instruments may, therefore, be appropriately designated by the term *order*.

I.

It is a well recognized rule of interpretation that when a term (here *note*) is employed in a statute which has a clear, defined and well ascertained legal signification, it will be presumed that it is employed in such legal sense, unless it clearly appears that some other meaning was intended in the particular statute in which it is found. And words in common use are to be given their plain, ordinary and usual signification. These rules are well established and illustrated by the following authorities:

Sedgewick on Stat. Con. 221.
Smith's Commentaries, Sec. 535.
Clark *v.* Utica, 18 Barb. 451.

United States *v.* Jones, 3 Wash. C. C. 209.
Merchants' Bank *v.* Cook, 4 Pick. 405.

The rule to be followed in the construction of revenue statutes is that the descriptive terms applied to mercantile instruments are to be understood according to the acceptation given to them by commercial men. United S. v. Gelhaus 7 Wall.

Arthur *v.* Cummings *et al.*, 91 U. S. 362.
United States *v.* Two Hundred Chests of Tea, 9 Wheat. 438; 10 Pet. 151; 3 How. 106.

2. The words "note" and "promissory note," are equivalent, and are used indiscriminately; and the legal or technical meaning of the word *note*, is the same as that which it has in its ordinary and usual acceptation. The orders taxed in this case do not come within any definition of the term note as given by any author, judicial or otherwise. 1st. They embody no *promise* by the party who signs them. 2d. They are not payable or redeemable in money, but simply call for the delivery of "merchandise at retail."

In 2 Abbott's Law Dic. Title NOTE 182, the author defines that word in this language: "A negotiable promise for the payment of money; a promissory note or note of hand."

Webster defines NOTE as applied to contracts thus: "A written or printed paper acknowledging a debt and promising payment; as a promissory *note;* a bank *note;* a *note* of hand; a negotiable *note.*"

Parsons, in 1 Parsons on Notes and Bills, 52, says: "As a promissory note is a written *promise* to pay money, so a bill of exchange is a written *order* for the payment of money."

The court, in the leading case of Cook *v.* Satterlee, 6 Cowen, 108, say: "The essential qualities of a bill or note are: 1. That it be payable at all events not dependent on any contingency, nor payable out of any particular fund; and, 2. That it be for the payment of money only, and not for the performance of some other act or in the alterna-

tive: Chit. on Bills 55." And see note in 16 Amer. Dec. 433.

In Benjamin's Chalmer's Digest: Notes, Bills and Checks, 270, this definition is given: "A promissory note is an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer, or to a person therein designated, or his order." (See also 1 Bish. Cr. Law, Sec. 214.)

Says Bouvier, (2 Bouv. Dic., 386, Title Prom. Notes:) "There are two principal qualities essential to the validity of a note." The second is stated in these words: "It is required that it be for the payment of money only. (10 Searg. & R., 94; 4 Watts' Penn., 400; 11 Vt., 268.)"

See the same thing, Story on Promissory Notes, secs. 17 and 18, and cases cited in notes.

Story here says: "The instrument, in order to be a valid promissory note, must be for the payment of money, *and for the payment of money only;* for if it be a promise to pay money, and to do any other act or a promise to do any act and not to pay money, it is not, in the sense of the commercial law, a *note.*"

3. Kent's Com., page 75, says: "To make an instrument a promissory note, it must be exclusively and absolutely for the payment of money."

It is true that a written promise to deliver chattels is sometimes called a "chattel note," but when the word *note* is used without more a negotiable promise in writing for the payment of money would be universally understood among commercial men. For example: If one person should agree with another to pay to him the purchase price of a horse, in the *note* of a third person, without other explanation, no one would contend that the agreement would be satisfied by the tender of an *order* or a *chattel note* or of any instrument not conformable to the foregoing definitions of the term *note.* The instruments in question however, containing no promise of the maker, are not even "chattel notes." They are not *notes* in any sense of the word.

II.

In order to come within the statute in question, the instruments must be adapted by their terms and nature to circulate *as* and represent *money*—to take its place and usurp its functions. It would be legally and intrinsically impossible for the instruments in question to represent money or usurp its functions, because not payable in money or measurable by a money standard. It is accordingly an essential quality of those instruments—such as notes and bills designed in the commercial law to circulate as and represent money, that they be solvable in that medium. 1 Parsons, Notes and Bills, 30.

III.

A careful examination of the legislation of Congress in relation to the currency and revenue *in pari materia* with the act in question, will show that whenever it has been the intention to designate any instrument, or class of instruments, the appropriate and distinctive name by which it is known in the commercial law, has been employed for that purpose. The words "notes" and "circulating notes"—of very frequent occurrence—are throughout this legislation employed in the sense of a negotiable promise for the payment of money, the legal title to which may pass from hand to hand by delivery. The words note, bill, check, certified check, order, draft, and the like, are everywhere used distinguishably and according to their respective and peculiar significations. For examples:

The second section of the act of July 17th, 1862, 12 Stat., 592, provides that "no private corporation, etc., shall make, issue, circulate or pay any *note*, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money, etc." Here the word *note* is employed in its appropriate and peculiar sense, not including check, memorandum, etc. This court has held that this statute—much broader than the one in ques-

tion—includes no instrument not payable in money. (6 Otto, 369.)

Again, in the Act of Feb. 25, 1863, to provide a national currency, etc., Sec. 20, (12 Stat., 670) in reference to notes designed to circulate as money, and which are designated in other sections as "notes," and "circulating notes," provides: "That after any such association shall have caused its promise to pay such notes on demand to be signed by the president or vice president and cashier thereof, in such manner as to make them *obligatory promissory notes*, payable on demand," etc.

In Section 7 of this Act of March 3, 1863, (12 Stat., 712) is this provision:

"That all banks, associations, corporations or individuals, issuing *notes* or *bills* for circulation as currency, shall be subject to and pay a duty of one per centum each half year, etc., on the average *amount* of circulation of *notes* or *bills* as currency, etc."

Here Congress, in order to include *bills* within the tax, named them as well as *notes*.

Sec. 23 of the Act of June 3, 1864, in reference to notes designed to circulate, requires them to be executed in such form as to be obligatory "promissory notes," etc. (13 Stat., 106.) And Sec. 36, of same act, uses "notes of circulation" and "bills of exchange" or "drafts," distinguishably; and Sec. 41, of same, imposes a tax of one half of one per centum each half year "upon the average *amount* of *notes* of *circulation*."

In the first part of section 110 (13 Stat., 278) of the Act of June 30, 1864, the words *check*, *draft*, and *certificate of deposit* are used distinguishably, and the same section imposes "a duty of one-twelfth of one per centum each month, upon the average amount of circulation of any bank, etc., or person, including as circulation all *certified checks*, and all *notes* and other *obligations* calculated or intended to circulate or to be used as money."

Palpably the word note is here employed according to

its circumscribed and proper sense, not embracing even *certified checks*.

In the Revised Statutes (enacted in 1874) 673, CHAPTER EIGHT, will be found in the third subdivision of Sec. 3408, this: "Third. A tax of one-twelfth of one per centum each month upon the average amount of circulation issued by any bank, association, corporation, company or person, including as circulation all *certified checks* and all *notes* and *other obligations* calculated or intended to circulate or to be used as money, etc."

In the same chapter, only three sections removed, and after this one containing this provision, in which the word *notes* is undoubtedly used in its distinctive and proper sense, and where Congress, intending to include "all certified checks" and "other obligations" in the same category with "all notes," found it necessary to name them—in Sec. 3412 is the provision for the ten per cent. tax, in this language: "Every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the *amount* of *notes* of any person, or of any state bank or state banking association, used for circulation and paid out by them."

Can it be a matter of doubt that the word *notes* was here used in the same sense in which it had been previously employed?

When the lighter tax was imposed, Congress saw proper to include "all certified checks" and "other obligations" in the category with "notes," but here where this heavy and destructive tax was under consideration, these instruments other than notes were *not* named, for the obvious reason that it was *not* the intention to include them.

Whenever Congress intended to include any other instruments in a given category with *notes*, it expressly named them, even in respect to instruments bearing a much closer analogy to notes than the orders taxed in this case. The inevitable inference is, that when Congress in a given case ceased to name other instruments it did not intend to include them.

The act of 1875, under the alleged authority of which the tax in question was assessed, is supplementary to this Chap. 8 of the Revised Statutes; and only differs from Sec. 3412 of the same, in extending the liability to pay the tax to other persons and associations as well as banking associations, while the language describing the subject of the tax remained precisely the same. In the statute in question, therefore, the word *note* was used according to its previous accurate and distinctive signification, and not confusedly or in any vague and indefinite sense.

2. It is a rule of consistency and law, that when a word has been employed in legislation upon a certain subject, in a given sense, and is again used, it is to be taken in its previous sense, unless the context shows a different intention.

The rule is laid down in this language, by the Supreme Court of Cal. (Pitte *v.* Shipley, 46 Cal. 160.) "It is a familiar rule of construction, that a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended." (McNichol *v.* U. S. Mercantile Agency, 14 Cen. L. J. 52; Broom's Leg. Max. 588.)

3. The act in question, and all the former acts of Congress relating to the currency and revenue, are *in pari materia*, and to be viewed together for purposes of interpretation.

1 Kent's Com. 463.
Smith's Com. 751, 752, 753, 770.
United States *v.* Collin, 3 Blatch. 325.
For a history of this legislation, see Veazie Bank *v.* Fenno, 8 Wall., 533.

Kent (*Supra* 463), says:

"Several acts *in pari materia* and relating to the same subject, are to be taken together, and compared in the construction of them, because they are considered as having one object in view, and as acting upon one system; and the rule applies, though some of the statutes may have expired,

or are not referred to in the other acts. The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions."

IV.

There are a number of other considerations, all leading to the same conclusion, that the instruments or orders taxed in this case are not within the statute in question.

1. The first provision for a ten per cent. tax on "circulation," is contained in Sec. 6 of the act of March 3rd, 1865, and was in these terms: "That every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of the notes of every state bank or state banking association, paid out by them after the 1st day of July, 1866." (13 Stat., 484.)

The next act on this subject was that of July 13, 1866, (14 Stat., 146) in these terms: "Every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of notes of any person, state bank, or state banking association, used for circulation and paid out by them after the 1st day of August, 1866."

In this form this legislation remained until the statute in question (Feb. 8th, 1875).

During this period, the liability to the tax extended only to banks and banking associations, and the subject of the tax was only bank notes, or notes in which banks were accustomed to deal. Speaking with reference to this tax, this court (8 Wall., 546–7) says: "The tax under consideration is a tax on bank circulation."

The object of Congress in this legislation, according to the court's opinion (8 Wall., 549), was "to restrain, by suitable enactments, the circulation *as money* of any *notes* not

issued under its own authority." The mischief aimed at is pointed out in these terms (*id.* 536):

"At the beginning of the rebellion the circulating medium consisted almost entirely of *bank notes* issued by numerous independent corporations, variously organized under state legislation, of various degrees of credit and very unequal resources, administered often with great, and not unfrequently, with little skill, prudence and integrity."

At least, then, the great part of the mischief at which all this legislation, including the statute in question, was aimed, was the circulation of *bank* notes.

Bank notes are payable in money—to bearer on demand—in form promissory notes, with peculiar legal and conventional attributes, assimilating them almost completely to money.

2 Parson's Notes and Bills, 88 *et seq.*

While the statute in question imposes the tax upon other notes, as well as bank notes—in other words, upon *bonk* and *other notes*, the latter must be held to mean notes *ejusdem generis*.

1 Bouvier Law, Dic. 619. Title EJUSDEM GENERIS.
1 Abbott's Law, Dic., 418.
6 Otto, 368; 4 Otto, 421.
Sedg. Stat. Con., 360 note.

2. Under the statute in question the liability of an instrument to taxation depends: 1st. Upon its terms and face; and, 2d. If of the requisite form, then also upon the use of it for circulation *as money*.

If by the terms and face of the instrument it is not within the class made taxable, extrinsic evidence is not admissible to affect its liability to such taxation.

United States *v.* Isham, 17 Wall, 504.
" " *v.* Van Auken, 6 Otto, 366.
Bull *v.* Sullivan, L. R. 6 Queen's B., 209.
Rice *v.* Ragland, 10 Humph. 545.
1 Abbott's Law, Dic., 146. Title, BILL OF EXCHANGE.

In United States *v.* Isham, 17 Wall., an instrument in all respects like the orders in this case, except that it was payable in money, was held not to be a promissory note.

In United States *v.* Van Auken, *supra:* An instrument in form a promissory note, but, like the instruments in this case, "payable in merchandise," was held not to be within the act of 1862 (12 Stat., 592), which is broader than the act in question, including with notes, "checks, memorandum, token or other obligation," and was aimed at the same mischief.

3. In this decision the following language—entirely applicable to the instruments in this case—is used:

"The statute makes the offense to consist of two ingredients: 1. The token or obligation must be for a less sum than one dollar. 2. It must be intended to circulate as money, or in lieu of the money of the United States. Here the note is for "goods," to be paid at the store of the Furnace Company. It is not payable in money, but in goods and goods only. No money could be demanded upon it. It is not solvable in that medium. The sum of 'fifty cents' is named, but merely as the limit of the value in goods demandable and to be paid upon the presentment of the note. Its mention was for other purposes, and has no other effect."

"In view of the law, the note is as if it called for so many pounds, yards or quarts of a specific article. The limit of value, there being none other, gave the holder a range of choice as to the articles to be received in payment, limited only by the contents of the store."

"But it is said the indictment avers that the note was intended to circulate as money, and that the demurrer admits the truth of the averment."

"To this there are two answers:—

"1. The demurrer admits only what is well pleaded. 2. The offence consists of two elements: the thing circulated, and the intent of the party circulating it." (6 Otto, 369.)

The measure of the tax under the statute in question is "*ten* per centum upon the *amount* of notes, etc." The orders taxed in this case represent only a heterogenous

variety of specific articles of merchandise. The words, "two dollars," and the like standing simply as so many pounds, yards or gallons, as the case may be.

They represent nothing that is capable of being combined into an "amount," in the sense of the statute on which a percentage can be computed.

4. The following principle is declared by this Court in United States *v.* Isham, 17 Wall. 504, to be founded in justice, and sustained by the authorities:

"If there is any doubt as to the liability of these instruments to be taxed, the construction of the statute is in favor of their exemption, because a tax cannot be imposed without clear and express words for that purpose." See also,

United States *v.* Walls, 1 Bond C. C. 583, 584.
Adams *v.* Bancroft, 3 Sum. 384.
Barnes *v.* Barney, 3 Blatch. 202.
Girr *v.* Sudds, 11 Excheq. 191.
Convoy *v.* Warren, 3 John Cases 259.
Cooley on Taxation, 199, 202.
U. S. *v.* Wilson, 106 U. S. 620.

V.

It follows, then, in this case, that the tax according to the admitted facts, was illegally exacted, and, the plaintiff having taken the necessary steps for its recovery, it was the duty of the court to instruct the jury to return a verdict for plaintiff.

2. The plaintiff was entitled not only to the amount paid, but also to interest on such amount from the time of payment, and the instruction of the court to that effect was not error.

Erskin *v.* Van Arsdale, 15 Wall. 75, 77.

For the foregoing reasons it is submitted that the judgment of the court below should be affirmed.

J. L. RAWLINS,
Atty. for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1883.

No. 1152.

JONATHAN C. WILLIS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRTEENTH DISTRICT OF ILLINOIS,

Plaintiff in Error,

vs.

THE BELLEVILLE NAIL COMPANY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF DEFENDANT IN ERROR.

CHARLES W. THOMAS,

Attorney for Defendant in Error.

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Attorney for Defendant in Error.

money was aimed at by the act in question, and no other circulation affected. But the familiar meaning of the word "circulation" as meaning the currency of a country, has been frequently applied to it by Congress. In the Revenue Act of June 30, 1861, section 110, circulation as it was there intended to be taxed, was defined to be "all certified checks and all notes and other obligations calculated to circulate or be used *as money*." Congress having thus determined what was meant by the word "circulation" in the principal law upon the subject of Internal Revenue, will be presumed to have thereafter used the word in the sense thus fixed. And it will be readily seen that to attach any other sense to it would tax every piece of negotiable paper made in the United States, and subject the business of the country to an intolerable burden.

It therefore seems clear that the word "circulation," as used in the Statute quoted above, means *circulation as money*, and this being established, the tax cannot be sustained under the decision of *U. S. vs. Van Auken*, 96 U. S., 366.

In that case the form of the paper which was issued, was as follows:

"BANGOR, MICH., Aug. 15, 1874.

"The Bangor Furnance Company will pay the bearer, on demand, fifty cents in goods, at their store, in Bangor, Mich. (Signed) A. B. HOUGH, Pres.,
CHAS. D. RHODER, Treas."

Van Auken was indicted under the Act of Congress of July 17, 1862, section 2, for paying out notes of the character mentioned, intending that they should circulate as money. There was a demurrer to the

indictment, and this Court held in substance, that the obligations not being solvable in money, could not, in intendment of law, circulate as money.

But the paper must not only be used for circulation, it must be paid out by the maker for that purpose. The words of the Statute, "notes used for circulation and paid out by them," are simply equivalent to the words "notes used and paid out for circulation by them," and any other construction makes the words "and paid out by them" entirely useless and meaningless. No one will contend that it was the purpose of Congress to tax the mere payment and delivery of negotiable paper in the ordinary course of business. The words "by them" in the phrase under discussion refer to and qualify the words "used for circulation," as well as the words "paid out." Were this not so, a corporation or person could be made to pay a tax on its checks or notes issued to pay debts in the course of business, and put into circulation without the consent and even against the will of the maker, for the liability to the tax would arise from the use to which the paper might be put by third persons, without any intention on the part of the maker to subject it to that use. Thus every man who paid out a check to bearer would be taxable under this Statute. This leads to such obviously impracticable and unintended results as to demonstrate that the construction contended for is the true one. The two elements must combine to make a taxable act. The notes must be paid out and used by the maker for circulation as money, before any tax can properly be levied under this law.

If this position is correct, and it cannot seem otherwise, the Statute in question, should be read as follows:

"Their own notes used and paid out by them for circulation as money," or "to circulate as and in lieu of money."

The *Van Auken* case shows, that if this construction be given the law, the tax cannot be sustained.

The second proposition is that no matter what the mental condition of the Company's officers may have been, the orders issued could not have been used for circulation within the meaning of the Statute.

We have already seen that the circulation intended by the act of 1875 is a circulation as, or in lieu of money. These orders were not for the payment of money, nor solvable in money; but even if they were, there would be grave doubt whether, under the circumstances, they could be brought within the statute.

They were issued by the Company as part payment for work and labor done by employees and for no other purpose than to pay existing debts. Such an issue is not an issue for circulating purposes. In the case of *U. S. vs. Ray*, 2 Cranch, C. C. Rep., p. 141, the court gave a charge to the jury embodying the correct rule of law, upon this point. The following language was used by the learned judge:

> "But if the jury should be of opinion, from the evidence, that the traverser passed away the said notes for the purpose of putting them into circulation, as a current circulating medium, and not in payment for goods, materials, services, or expenses for the use of said company in the ordinary course of their business as a manufacturing company, with a view to defraud or injure any person, then he was guilty," &c.

Thus it would seem that there is a well defined legal distinction between paper payable in money issued to pay debts and that issued to circulate as money. The first class includes all negotiable paper and could not have been within the purview of the law.

In the case of *United States vs. Wilson*, 106 U. S., 620, certain certificates of indebtedness payable in money, were issued in payment for labor done and supplies and machinery furnished a Railroad Company, and the learned Solicitor General unopposed was not able to persuade this Court that they were taxable.

But in addition to the fact that these orders are not payable in money and hence could not circulate as money, and the additional fact that they were issued in the ordinary course of business to pay existing debts, there is another consideration to be noticed.

They are not payable by the maker, and hence could not have been paid out or used for circulation as money or otherwise.

The primary meaning of "circulation" is "the act of moving in a circle, or of going and returning." That which goes but does not return does not circulate. That only circulates which returns to the place whence it departed. All circulating notes must of necessity come back to the maker. The national bank notes circulate because they go out from the banks and by their terms return thereto. It is a manifest contradiction of terms to say that an order drawn by one person directly upon another by name, can circulate. No matter how much the order may vary

from a direct course to its destination, the mere fact that it does not come back to the place whence it started, precludes the idea of its circulating. No one ever heard of a circulating note for money which was not payable by its maker. In consonance with this idea Congress in Sec. 3,408, Rev. Stat., taxed *certified* checks intended to circulate as money for the obvious reason that the certification by the bank is equivalent to starting the check from the bank to return again thereto.

For these reasons this case is much stronger than the *Van Auken* case, *supra*, where the order did, by its terms return to its maker, and as far as this point is concerned, *could have "circulated."*

But there is another objection to the validity of this tax.

These orders are not notes within the meaning of the statute. A note is an instrument drawn by a definite person or corporation containing a promise to pay another person or corporation or the bearer a definite sum of money or a definite article of personal property, at a particular time or on demand. If the instrument has these qualities it is a negotiable note, and if it has them not it is not a negotiable note. It is hardly necessary to argue that an unnegotiable note could not circulate as money, no matter what its maker really intended when he issued it. The mental condition of the maker has nothing to do with the discussion. It is determined solely by what he does. It is true the law makes every man intend the legitimate and natural consequences of his acts, but it is also

true that it does not charge him with intending by a given act, a thing which the act could not accomplish. It is not material how hard a man tries to circulate a non-circulating and unnegotiable instrument, in legal intendment he cannot do it. An unnegotiable instrument cannot be circulated, and if it could, it does not come within the law, because it is not a note. An order not payable in money cannot be circulated within the meaning of the statute, because it cannot be used as money, and the number of men who pass it from one to the other has no bearing upon the question. In order to charge the maker with a tax the paper must not only be negotiable and payable by the maker, but it must be paid out and used by him for circulation, and not in the payment of debts in the ordinary course of business.

It appears therefore that the instruments, instead of having all the elements required by the statute, have not a single one of those elements.

CHARLES WAIT THOMAS,

Attorney for Defendant in Error.